



October 11, 2001

Ms. Laura Garza Jimenez  
County Attorney  
Nueces County  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2001-4609

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153171.

The Nueces County Constable, Precinct 5, (the "constable") received a written request from an attorney for all information relating to a complaint filed by the requestor's client against a deputy constable. You have submitted to this office as responsive to the request a typed statement from the deputy constable describing the incident, a "Nueces County Sheriffs Department Search Request," and a tape recording of the complainant's statement. You contend that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code.

Section 552.103 of the Government Code is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a

claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you contend that the submitted documents are excepted from public disclosure under section 552.103 because you represent that the requestor's client told the chief deputy constable that "she would be suing the Constable's office." However, the chief deputy's affidavit that you submitted in support of your representation states that complainant merely stated that "she still had up to two years to go civilly against the department." This statement, in and of itself, does not constitute a threat of litigation. After considering the totality of the circumstances, we do not believe that you have clearly established that litigation against the constable was reasonably anticipated at the time the constable received the records request. Accordingly, the constable may not withhold any of the requested information pursuant to section 552.103 of the Government Code.

We now address your contention that the requested information is excepted from public disclosure pursuant to section 552.108(a)(2) of the Government Code, which protects "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution," but only where "an investigation . . . did not result in conviction or deferred adjudication." You have submitted to this office in support of your section 552.108 claim an affidavit from a sergeant with the Texas Rangers. In the affidavit, the sergeant states that the chief deputy provided him with a written statement from the complainant describing the incident<sup>1</sup> and that the sergeant then conducted an initial investigation. The sergeant's affidavit then goes on to state:

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<sup>1</sup>This written statement was not among the documents you submitted to this office.

I contacted [the Nueces County District Attorney's Office] by telephone and read the written statement provided by [the complainant]. . . . [The district attorney's office] informed that . . . there was insufficient evidence to merit a criminal investigation. I then informed [the chief deputy] of [the district attorney's] response and [the chief deputy] advised that his office would conduct an administrative investigation.

After reviewing the records you submitted to this office as being responsive to the records request, it is apparent to this office that all of the records at issue were created in connection with the constable's internal affairs investigation after the criminal investigation had concluded. Because internal affairs investigations are administrative, as opposed to criminal, in nature, section 552.108(b)(2) is generally inapplicable to such investigations, which cannot result in conviction or deferred adjudication unless the IAD investigation is conducted in conjunction with a criminal investigation. *See also Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). Because the information at issue was not created in conjunction with a criminal investigation, the department may not withhold the documents at issue pursuant to section 552.108. Accordingly, we conclude that the department must release the information at issue in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

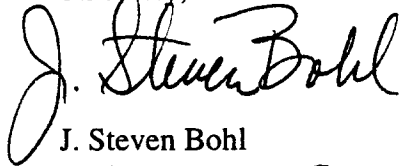
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/RWP/seg

Ref: ID# 153171

Enc. Submitted documents

c: Mr. Charles C. Smith  
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(w/o enclosures)